

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION

RECEIVED

Table of Contents

I.	<u>Introduction and Statement of Interest</u>	2
II.	<u>General Comments</u>	3
III.	<u>Specific Issue Analysis</u>	4
	<u>Paragraphs 13-19. Limitation of Pay-Per-Call Service to 900 Exchanges</u>	4
	<u>Paragraph 30. Definition of Credit or Charge Card</u>	7
IV.	<u>Conclusion</u>	17

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

APR 20 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Policies and Rules
Implementing the Telephone
Disclosure and Dispute
Resolution Act

CC Docket No. 93-22
RM - 7990

COMMENTS OF PILGRIM TELEPHONE, INC.

Pilgrim Telephone, Inc. ("Pilgrim"), by and through its attorneys, hereby files its comments before the Federal Communications Commission ("Commission") in response to the Commission's proposed telephone disclosure rules.¹ These rules have been promulgated pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992.²

Pursuant to the TDDRA, the Federal Trade Commission ("FTC") is simultaneously conducting a rulemaking to address issues related to consumer disclosure, preamble and advertising

¹ Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, CC Docket No. 93-22, RM-7990, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 93-87, released March 10, 1993 ("NPRM").

² Telephone Disclosure and Dispute Resolution Act of 1992, Pub. L. 102-556, October 28, 1992 ("TDDRA"). The TDDRA amended certain provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 1 et seq. (1993) ("Trade Act"), adding new Sections 5711-14, 21-24, and the Communications Act of 1934, 47 U.S.C. §§ 151 et seq. (1993) ("Communications Act"), adding a new Section 228.

used in conjunction with pay-per-call services.³ Pilgrim is also a participant in those proceedings.

I. Introduction and Statement of Interest

Pilgrim is an interexchange carrier ("IXC") providing a

increases, and the variety of service options offered by IXC's increases, the proliferation of IP services which may vary widely in their provision will add to this confusion absent clear and concise rules. On behalf of itself, as a carrier, and in the interest of all of its customers, Pilgrim seeks to assist in the development of clear, concise, fair and effective rules.

II. General Comments

As is apparent from the number of proceedings and petitions related to pay-per-call services which have taken place over the last year before the Commission,⁴ and the passage of the TDDRA, there is no doubt that there is a need for uniformity in the rules to be applied to IP pay-per-call services. Consumers need clear and consistent rules with which they can develop an understanding of IP services, and when charges will or will not accrue. IXC's and other parties also need clear, consistent and uniform rules by which they can determine the legality of their service offerings, without having to second guess every service offering, and be assured of the ability to collect charges for legitimately provided telecommunications services.

⁴ See, e.g., Policies and Rules Concerning Interstate 900 Telecommunications Services, CC Docket No. 91-65, Report and Order, 6 FCC Record 6166 (1991); Petition for Clarification and Modification, National Association of Attorneys General, Notice of Petition for Rule Making, 57 Fed. Reg. 26,642 (June 15, 1992) This latter proceeding has been incorporated into this docket.

Clarity of and certainty under the rules can be achieved partially through the adoption of rules designed and drafted to explicitly cover the intended practices, and exclude those not intended to be covered. To the extent that rules can be drafted to explicitly delineate acceptable and unacceptable conduct, they can provide consumers with a reliable guide as to what to expect, and provide carriers with reliable guidelines to follow. Clear and explicit rules can help carriers and IP's avoid costly and extensive complaints from consumers, other carriers, and the plethora of state and federal agencies which may have overlapping jurisdiction and varying interpretations of the rules. The provision of telecommunications service, which is both complex and highly technical, is especially vulnerable to problems associated with a multitude of interpretations.

III. Specific Issue Analysis

For ease of analysis, Pilgrim addresses the specific rule provisions by the numbered paragraphs discussed in the NPRM.

Paragraphs 13-19. Limitation of Pay-Per-Call Service to 900 Exchanges

Although there are good reasons for limiting pay-per-call services to certain exchanges, the Commission should be aware of two problems specifically raised by limiting all pay-per-call services to the 900 service exchange, and limiting other

options. These reasons stem from the high cost and anti-competitive nature of 900 service offerings. The Commission has strived to promote competition in all telecommunications services in the past, and should continue to do so in this proceeding.⁵

There are two specific costs which, especially in terms of their magnitude, are unique to 900 service. First, LEC's charge extraordinary amounts for the turning up of 900 service -- an amount which Pilgrim believes is unjustifiably higher than the similarly provisioned and accessible 800 service. The high costs imposed on smaller IXC's virtually prohibits entry into 900 service provision, and causes migration of service either to local service alternatives, or to the 900 service offerings of the few larger carriers which can afford these disproportionately high expenses.

It is true that 900 numbers are available on a resale basis from the larger IXC's which have already acquired 900 NXX's from the LEC's. The costs of transport over these lines is, however, disproportionately high. Comparing the cost per minute of 800 and 900 transport, 800 transport costs an average of 10 cents per minute, whereas 900 transport alone costs between 28

⁵ See, e.g., Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Notice of Proposed Rulemaking, FCC 93-103, released February 19, 1993 at para. n.3, and cases cited therein regarding general Commission policies, and para. 10-13.

and 30 cents per minute. This factor of three appears to have no justifiable basis.

The Commission should also take into account the fact that there is no true competition in 900 service, as there will soon be in 800 service, and that IP's and other customers cannot freely shift their traffic from one carrier to another. This principle of portability, which has consumed the Commission in various dockets since 1986 with regard to 800 service, is completely ignored with respect to 900 numbers.⁶ Pilgrim urges the Commission to address the issue of 900 portability, and true competition in the 900 market.

Should the Commission determine that all pay-per-call traffic must be routed to 900 numbers, it should also address the high costs associated with acquiring 900 NXX's, and with the cost of resale 900 transport.⁷ The Commission should also address the effect on the pay-per-call market of forcing all traffic into an

⁶ See Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 (1991), Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991). The Commission explicitly determined that the lack of 800 number portability was an impediment to full competition in 800 services. 6 FCC Rcd at 7569. The competitive situation with regard to 900 services is even more critical.

⁷ Pilgrim notes in its Comments filed before the Federal Trade Commission that this cost element is one of utmost concern when evaluating the cost impact of extended preambles during 900 calls, and operates as a primary incentive to limit preamble and "no charge" times. Comments of Pilgrim Telephone, Inc. Before the Federal Trade Commission, Proposed Telephone Disclosure Rule, FTC File No. R311001, filed April 9, 1993 at 14-15.

arena dominated by a duopoly or oligopoly which is unlikely to see substantial competition due to the high costs involved, and lack of number portability.

Paragraph 30. Definition of Credit or Charge Card

The NPRM seeks comment on whether the definition of "credit card" and "charge card" as used in the Commission's proposed regulations includes telephone issued calling cards. NPRM at para. 30. It is important to clarify this matter at this time to provide stability to the industry and certainty to the regulations. It is in the best interest of the telecommunications industry for all participants to have a common understanding of the definitions and terminology used in regulatory and enforcement matters. In addition, if the Commission were to substantially change the definition of credit cards from previous interpretations, it could substantially hamper the industry's understanding of and ability to comply with other regulatory requirements, such as those arising from the Helms amendment, and possibly expose these parties to liability.

Credit cards and charge cards in general are regulated by the Federal Reserve System. In rules promulgated by the Federal Reserve, otherwise known as Regulation Z, the terms credit card and charge card are defined as follows:

Credit card means any card, plate, coupon book or other single credit device that may be used from time to time to obtain credit.

Charge card means a credit card on an account for which no periodic rate is used to compute a finance charge.

12 C.F.R. Section 226.2.

Regulation Z is issued pursuant to the Federal Truth and Lending Act contained at 15 U.S.C. Section 1601 et seq. and under definition specifically contained at Section 1602.

Although this definition is specifically for purposes of the regulations issued pursuant to that Act and the rules of the Federal Reserve, those same rules do apply to telephone charge cards as they are not regulated by the Commission.

As telephone charge cards are cards used to obtain credit for telephone services, they appear to fall squarely within the Federal Reserve's definition. The Federal Reserve's definition should be dispositive of the classification of these cards, and demonstrates that telephone calling cards and other similar credit and charge cards should be defined as credit cards.

The Commission itself often uses the term credit cards and calling cards interchangeably in reference to telephone calling cards. In recent opinions issued by the Commission, these terms were used interchangeably and telephone companies which issue cards were referred to as "card issuers."⁸ The Commission has issued a Public Notice referring to telephone calling cards as "specialized credit cards."⁹

In addition, with the advent of the AT&T Universal Card[®] and similar cards, some telephone calling cards may now be used to charge products and services other than telephone related products and services. As these distinctions blur, there appears to be no reason for excluding telephone calling cards from the definition of credit cards.¹⁰

Even absent the Commission's own statements, it is unclear whether the Commission has the authority to distinguish between credit and charge cards. The Commission has determined

⁸ Policies and Rules Concerning Local Exchange Carrier and Validation Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Notice of Proposed Rulemaking, 79 RR 2d 149 (1991).

⁹ Public Notice, Telephone Calling Cards, DA 92-666, released June 8, 1992.

¹⁰ The Commission has recognized that misuse of credit cards or access codes may constitute fraud under state or federal law. Enforcement 2d R&O, 59 RR 2d at 240 n.54. To the extent that this is true for both credit cards and telephone calling cards, additional support is lent to the argument that telephone calling cards qualify as credit cards.

that billing and collection services, and hence telephone calling cards, are ancillary to the provision of telecommunications service and are not common carrier services regulated by the Commission.¹¹ It would appear, therefore, that these cards are outside of the Commission's jurisdiction. The Commission's limited jurisdiction was recognized last year by the Chief of the Common Carrier Bureau in an open meeting of the Commission where he acknowledged that telephone company calling cards are not regulated by the Commission, and that they were, therefore, credit cards subject to the jurisdiction of the Federal Reserve Board.¹²

However, even if the Commission has authority to define credit cards for the limited purpose of its own regulations, there is no reasonable basis upon which to distinguish credit cards from calling cards. Telephone calling cards or charge cards, automatic teller machine cards, gasoline or other retail

who are permitted to charge on a telephone calling card may be more limited than those permitted to process charges to American Express cards. Distinctions between the cards previously listed by the Commission as examples of permissible charge mechanisms and telephone calling and other cards has become increasingly blurred through the issuance of multipurpose calling cards, such as AT&T's Universal Card® and Sprint's VISAPhone® card.

Given these factors, and the similarity of telephone calling cards, retail credit cards, and the cards previously mentioned by the Commission, we submit that there is no reasonable or lawful basis for distinguishing between these cards. Each of these cards are similar in function, operate in an identical fashion in assuring restricted access by minors to adult services and share a common definition under Federal Reserve regulations. Under these circumstances, an attempt by the Commission to arbitrarily distinguish between credit cards and telephone calling cards would appear to be unreasonable and an abuse of discretion.¹³

In addition to concerns about the Commission's jurisdiction and the basis upon which a distinction may be made between telephone calling cards and other types of credit cards,

¹³ An agency cannot accord different treatment to similar situations; to do so is arbitrary treatment amounting to an abuse of discretion in violation of administrative procedures. See Garrett v. FCC, 513 F.2d 1056, 1060 (D.C. Cir. 1975), and cases cited therein.

the FCC must also be careful not to inadvertently undermine other regulatory efforts which are based on current definitions used in the industry, and future regulation to be adopted under TDDRA.

One such example is the Helms Amendment, Section 223(b) of the Communications Act of 1934 ("Act"), 47 U.S.C. § 223(b), which establishes "safe harbors" for IP's and carriers related to the provision of information services, and access to such services, under Section 64.201 of the Commission's Rules, 47 C.F.R. § 64.201.

Most IXC's and local exchange carriers operating in the United States today are required to occasionally transmit communications which may contain adult content regulated under the Helms Amendment. This requirement stems from the duty of common carriers to serve all parties indifferently.¹⁴ Carriers with whom we work strive to comply with all provisions of the Act. Among the most complex and difficult provisions to understand are those of the Helms Amendment and the rules promulgated thereunder.

One of the safe harbors adopted by the Commission in Section 64.201(a)(2) is the payment for the service by credit card prior to transmission of the message. It appears that a

¹⁴ Section 201(a) of the Act. See National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976).

number of carriers and other companies are operating or are planning to operate under the impression that "credit cards" encompass all commercially issued credit cards, including telephone calling cards, retail gasoline credit cards and ATM cards. If the Commission were to now define the term "credit card" as exclusive of other types of charge cards such as telephone calling cards, it could seriously hamper carriers' ability to comply with the Helms Amendment.

Congress' primary goal in passing the Helms Amendment was to restrict access by minors.¹⁵ The regulations issued by the Commission pursuant to the Helms Amendment have been fashioned to achieve this restriction to access.¹⁶ The defenses to prosecution under the Helms Amendment regarding credit cards, authorization access codes and scrambling are intended to limit access by minors to these services.

Payment by credit card has been a safe harbor since the first time the Commission proposed rules under the Helms Amendment. In its initial reference to credit cards, the Commission stated that "[t]ypical credit cards include Visa,

¹⁵ See Congressional Record, November 16, 1989 at 515793-94, comments of Senator Helms; Regulation Concerning Indecent Communications by Telephone, Gen. Docket No. 90-64, Report and Order, 67 RR 2d 1460, 1462 (1990) (Regulation R&O).

¹⁶ See Regulation R&O, 67 RR 2d at 1466; Regulation Concerning Indecent Communications by Telephone, Gen. Docket No. 90-64, Notice of Proposed Rulemaking, 5 FCC Rcd 1011 (1990) (Regulation NPRM).

Telephone calling cards meet the concerns of Congress with regard to the Helms Amendment due to the fact that, like other credit and charge cards, they are not routinely issued to minors and commonly carry an age requirement. In addition, any minors issued such credit cards are subject to the same parental supervision as other cards previously mentioned by the Commission. It is equally unlikely that these other types of charge or calling cards would be issued to individuals who did not have an independent credit rating. Based upon the above, therefore, telephone calling cards are fully subsumed in the definition of credit or charge cards.

In addition to a possible interference with the Helms Amendment, any definition of charge or credit cards which does not include telephone calling cards would interfere with the implementation of the TDDRA, and prohibit many practices of carriers which permit access to a variety of network services. Under the TDDRA, common carriers will be required to place provisions in their tariffs and contracts which prohibit the use of any 800 number for any call during which the calling party is assessed, by virtue of completing the call, a charge for the call,²¹ or for which the calling party is charged for information conveyed during the call, unless the calling party discloses a credit or charge card number during the call.²²

²¹ TDDRA, § 228(c)(6)(A).

²² Id., § 228(c)(6)(C).

Many carriers use 800 numbers for access to the network, provision of directory assistance in routing, business and other teleconference services and other carrier business provision services. For instance, prior to the initiation of 10XXX access to IXC's, most, if not all, carriers utilized 800 numbers for access to their networks from remote locations.²³ Even now, most carriers still operate 800 numbers for remote access to the network. Use of these numbers is required as ubiquitous access via 10XXX dialing is still not available for many jurisdictions, depending upon the local exchange switching technology used. Access to IXC's through 10XXX dialing is also still blocked in many instances, an issue with which the Commission still struggles, and many times 800 number access provides an alternative means of access to IXC networks.

It is clear that in these any many other arrangements, the calling party is assessed, by virtue of completing the call, a charge for the call, which charge is made to its authorization code or calling card. Technically, the calling party is being charged for information conveyed during the call, especially when

²³ In addition, 800 numbers are used for access to many virtual networks provided by the carrier, for which a charge may be incurred to the calling party as a network user. In most typical situations, and due to the need to control toll fraud or properly assign costs to virtual network users, callers are required to use either a calling card or authorization code for completion of calling through 800 access. The Commission may wish to broaden the definition of credit or charge cards to include authorization code cards when such cards can be used for charging calls or services over carriers, networks or the networks of their customers.

the information conveyed is free and the charge is for the transport connections to the information.²⁴

It is precisely these definitional problems and uncertainties that the Commission should clarify during this rulemaking so that carriers clearly know what their responsibilities are and what services may be provided without fear of running afoul of either TDDRA or the Commission's rules. Continuing the recognition that telephone calling cards are charge or credit cards, and possibly expanding this recognition to authorization codes which result in a charge to a party, would provide this level of clarity and certainty. The Commission can provide additional certainty to its rules by adopting an interpretation or specific rule finding that charges which are tariffed by a carrier for transport do not constitute a charge for the information conveyed.

IV. Conclusion

In conclusion, Pilgrim believes that the purposes of the Commission and the public will be best served by clear and certain rules, achieved through the adoption of rules designed

²⁴ Another means of avoiding this definitional problem is to determine that when the information conveyed during the call is either free or carries its own separate charge, and that the only charge caused during the call is for carrier transport, which is provided subject to state or federal tariff, then such charge is not deemed to be for information conveyed during the call and there is no violation of § 228(c)(6)(C).

and drafted to explicitly cover the intended practices, and exclude those not intended to be covered. The Commission should also consider the impact of its proposals on competition in this market, and carefully weigh its options in light of the competitive implications. In many regards, full competition in this market will provide yet another valuable pro-consumer control on the practices of all parties involved.

Pilgrim looks forward to further participation in these proceedings, and to the opportunity to review and respond to the comments of the other parties.

Respectfully submitted,

PILGRIM TELEPHONE, INC.



Walter Steimel, Jr.
Fish & Richardson
601 13th Street, N.W.
Fifth Floor North
Washington, D.C. 20005
(202) 783-5070

Dated: April 20, 1993

Attorneys for
Pilgrim Telephone, Inc.

19545.w11